

STATE OF MICHIGAN  
IN THE 7TH CIRCUIT COURT (COUNTY OF GENESEE)

NU-TECH PLASTICS ENGINEERING, INC.,

Plaintiff,

vs

Case No. 02-75335-CK

GENERAL MOTORS CORPORATION, et al.,

Defendants.

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DEFENDANT'S MOTION FOR SUMMARY DISPOSITION  
BEFORE THE HONORABLE ROBERT M. RANSOM, CIRCUIT JUDGE

FLINT, MICHIGAN - THURSDAY, MARCH 24, 2005

APPEARANCES:

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TABLE OF CONTENTS

EXHIBITS:

None

WITNESSES:

None

1 Flint, Michigan

2 Thursday, March 24, 2005 - 9:56 a.m.

3 (All parties present)

4 THE COURT: The Court will proceed in the  
5 matter of Nu-Tech Plastic Engineering, Inc. versus  
6 General Motors Corporation, et al., file number 02-  
7 75335-CK. This matter is before the Court on  
8 defendant's motion for summary disposition.

9 Mr. Lippert, you may address the Court.

10 MR. LIPPERT: Thank you, Your Honor.

11 While we were waiting, Mr. Schwartz and I  
12 were just having a nice conversation about England.  
13 So, we made good use of the time, Judge.

14 With the Court's permission, I have prepared  
15 an exhibit list which is only on part of the exhibits  
16 that may eventually be used if this case goes to  
17 trial, and I intend it only as a roadmap, and I will  
18 give Your Honor a copy. And also I have marked some  
19 of the exhibits that I'll be talking about in my  
20 motion. Mr. Schwartz also has all of these. And with  
21 permission I will give these to Mr. Allen.

22 THE COURT: Okay. Thank you.

23 MR. LIPPERT: It helps me sometimes if things  
24 are highlighted a little bit, especially where there  
25 are so many documents.

1 The motion that the defendant --

2 THE COURT: Let me ask you --

3 MR. LIPPERT: Yes, sir.

4 THE COURT: -- preliminarily, how much time  
5 do you need to argue this, Mr. Lippert?

6 MR. LIPPERT: Judge, I have tried to detail  
7 my motion as much as I could possibly think to detail  
8 it in writing, and I don't plan to read to the Court.

9 THE COURT: Okay.

10 MR. LIPPERT: In fact, if you would prefer, I  
11 would simply answer questions. But I can give you  
12 just a short 10 minute statements or less.

13 THE COURT: Okay.

14 Mr. Schwartz?

15 MR. SCHWARTZ: Same thing. I think my brief  
16 was pretty detailed. There some things -- there was a  
17 reply brief filed, but I haven't had a chance to  
18 respond to that and I want to address it today. But I  
19 think that I can make my presentation to you in 15  
20 minutes.

21 THE COURT: Fine.

22 Mr. Lippert, you may begin.

23 MR. LIPPERT: Thank you, Your Honor.

24 The motions, Your Honor -- or the motion  
25 that I have made has multiple aspects to it. But the

1           one I would like to talk about first is the standing,  
2           a proper party to bring this lawsuit. Nu-Tech was a  
3           corporation that was organized in about 1995. At that  
4           time the majority shareholder was Mr. John Mailey, an  
5           Afro-American, who became the majority minority  
6           shareholder, a somewhat confusing term. But Mr.  
7           Mailey remained the majority shareholder up until  
8           December -- up to and including December of 1999, when  
9           Nu-Tech was sold to Rapid Products Technology, another  
10          corporation.

11                 After that date, there was a transfer of Mr.  
12          Mailey's stock to Mr. Cooper for reasons that I don't  
13          think we need to bother the Court with, but at that  
14          time Mr. Cooper became the majority shareholder, and  
15          the sole owner of Nu-Tech, and this lawsuit was  
16          brought by Mr. Cooper for Nu-Tech, which, of course,  
17          he would have a right to do.

18                 I do not know, Judge, whether -- at the time  
19          the lawsuit was filed, whether Mr. Cooper was the sole  
20          shareholder. I haven't been able to figure that out.  
21          The date of the transaction is a bit vague, and on my  
22          inquiry with Mr. Cooper, I have never gotten an answer  
23          to that that satisfies me. So, I cannot tell you when  
24          he became the majority shareholder, except to say it  
25          is agreed and undisputed that it was after the sale of

1 Nu-Tech -- of Nu-Tech assets was made to Rapid in  
2 December of 1999.

3 We have filed the affidavit of Mr. Mailey  
4 who says that while he was the majority shareholder of  
5 the corporation, it was his well founded belief that  
6 there were no claims that could be made against Delphi  
7 based either upon the breach of contract claim, which  
8 is asserted in the plaintiff's complaint, or the  
9 promissory estoppel claim. The basis for that was,  
10 and it's stated in his affidavit, that Delphi had  
11 performed all of the conditions under the contract and  
12 there was no breach.

13 Also, he says that Delphi had fulfilled all  
14 of its promises, if any, made to Nu-Tech, and there  
15 was -- and is no claim for promissory estoppel. My  
16 argument with respect to that, Judge, is rather  
17 straightforward. If the owner of a corporation  
18 believes there is the lawsuit at the time the cause of  
19 action arose, or the alleged cause of action arose,  
20 how can there be a later revived cause of action? If  
21 Mr. Cooper is the minority shareholder and thought  
22 there were claims or causes of action, his rights  
23 would be against Mr. Mailey, the majority shareholder,  
24 to say you're not protecting my rights as a minority  
25 shareholder to bring these actions and do so. That

1 would have been another kind of lawsuit, and the  
2 result of that would have been to either bring the  
3 lawsuits or not. But you don't do what was done in  
4 this case, sell the corporate assets, and then say,  
5 by the way, we have preserved something in the nature  
6 of the two causes of action.

7 Now, we come by the argument that the  
8 transfer of assets was made because that's apparent  
9 from the two sales of purchase agreements that were  
10 signed by Mr. Cooper on behalf of Nu-Tech and by Mr.  
11 Mailey on behalf of -- or Mr. Cooper, excuse me, on  
12 behalf of the companies that were leasing equipment to  
13 Nu-Tech, and also signed by Mr. Mailey and by Rapid.  
14 These contracts were prepared by Nu-Tech's counsel and  
15 were eventually executed, as I say, on December 1999.

16 The contracts are clear and unambiguous.  
17 Mr. Schwartz agrees with that in his brief.  
18 Therefore, you should look within the four corners of  
19 those agreements as to what they say. I don't think  
20 there is any dispute, as I read Mr. Schwartz's answer,  
21 that there was an asset transfer, and that causes of  
22 action would be assets.

23 As I understand, and he can certainly speak  
24 for himself, but if there is a dispute on that, then I  
25 say, Judge, just simply look to the agreements

1 themselves, and they say all assets, tangible and  
2 intangible, and there is a long list. And in the  
3 reply brief that I have filed, I cited those cases  
4 that say all means all. There's no equivocation on  
5 that.

6 Mr. Schwartz does say though, however, that  
7 there were excluded assets in those contracts, and the  
8 excluded assets are -- the excluded assets include  
9 accounts receivable, which they do, and that accounts  
10 receivable are -- that these causes of actions were  
11 accounts receivable. Well, I would say, Judge, that  
12 would come as a great surprise to accountants, to IRS  
13 examiners, to Judges who look at wrongful death cases  
14 to see that those wrongful death claims filed in  
15 Probate Court are accounts receivable, and not causes  
16 of action. When those probate proceedings are opened,  
17 they are listed as causes of action and not accounts  
18 receivable.

19 Once more, Judge, the Delphi Exhibit C,  
20 which is one of the 1999 sale purchase agreements, in  
21 article 1.4B, defines accounts receivable as this,  
22 accounts receivable attributable to services rendered.  
23 That's the definition in the four corners of the  
24 contract. That does not say causes of action. It  
25 says accounts receivable attributed to services



1 rendered. This business sold -- or manufactured and  
2 sold products to what -- to 18 different customers  
3 that I've been able to count. On the accounts  
4 receivable statement prepared by BBK, and on there it  
5 shows those customers and the accounts receivable  
6 collectible from those customers on that Exhibit.  
7 That's the record kept in the ordinary course of  
8 business and submitted as part of this motion.

9 Also, we have the records of Daig and Daig,  
10 and Mr. John Daig, an accountant, was deposed. Those  
11 records have been verified. In Mr. Daig's records, it  
12 shows accounts receivable owing from Delphi and lists  
13 the \$253,000 or \$250,000, or some figure like that.  
14 It does not include contingent assets of claims or  
15 causes of action. And at the time those documents  
16 were created, Judge, they would have been claims and  
17 -- if there were valid claims to be made against them.

18 So, the argument is, Judge, straightforward  
19 that the transaction in December of 1999, when Nu-Tech  
20 sold its assets to Rapid Technology, carried with it  
21 any claims and causes of action.

22 Now, interestingly, the plaintiff has filed  
23 in response a document which purports to be a  
24 memorandum and assignment of assets. It's -- the  
25 person signing that does not identify it on the

1 document for Rapid Technology. I see that signature,  
2 and I'm not a handwriting specialist, is the same as  
3 the gentleman or the person who signed the Rapid  
4 Technology agreement at the time of the sale. He is  
5 on a witness list that was filed some months after the  
6 time for filing witnesses was closed, but we can  
7 handle that matter later I suppose, if we have to.

8 It's an interesting document for this  
9 reason, number one, Judge, it's not an affidavit, and  
10 therefore doesn't meet the requirements of the court  
11 rule for responding to a motion for summary  
12 disposition, and I've covered that in my reply brief  
13 of what those requirements are. Number two, it's not  
14 a record kept in the ordinary course of business of  
15 Nu-tech or Rapid Technology, and therefore meeting the  
16 hearsay or falling within the hearsay objection of the  
17 Michigan Rules of Evidence.

18 So, for two reasons, Judge, it should not be  
19 considered. But if it is considered, I would like to  
20 point out two things. There appears to be a tacit  
21 resignation in that document that the assets, that is  
22 to say the two causes of action, were transferred.  
23 And it goes on to say then that if they -- if you do  
24 find the Court -- this Court finds that those assets  
25 were transferred by virtue of the December 1999

1           agreements, then by virtue of this document made March  
2           8, 2005, we, Rapid Tech, send it all back to Nu-Tech  
3           and Mr. Cooper so that he can have a cause of action  
4           on them.

5                     Well, I cited the court rule, Judge, and the  
6           cases that deal specifically with the amendment of  
7           pleadings. You cannot amend a pleading to add a new  
8           party. The new party -- so, we have this situation  
9           occurring.

10                    The assets are transferred to Nu-Tech. Nu-  
11           Tech has no right to bring this pending cause of  
12           action. Period.

13                    If there is a reassignment of that claim  
14           back to Nu-Tech or those two claims back to Nu-Tech by  
15           virtue of that March 8, 2005 agreement, then if Nu-  
16           Tech wants to bring their cause of action, it should  
17           be brought as Nu-Tech, assignee of Rapid Technology,  
18           Inc., under date of agreement March 8, 2005. And if  
19           that lawsuit is filed, then we will deal with that one  
20           on its own merits down the road sometime in the  
21           future.

22                    However, the document is not sufficient to  
23           breathe vitality back into a lawsuit where the party  
24           bringing it had no standing to bring it in the first  
25           instance.

1                   The second part of the motion, Judge, has to  
2                   do with the contracts which are alleged to be  
3                   breached. Again, Mr. Mailey, the majority  
4                   shareholder, has said in his affidavit, there was no  
5                   breach of contract. Delphi, which had various  
6                   agreements for parts, I think 10 different parts were  
7                   being produced by Nu-Tech for Delphi, he said they  
8                   fulfilled all of the terms and conditions of all of  
9                   those contracts. However, plaintiff has isolated out  
10                  two agreements by virtue of their interrogatory  
11                  responses which they say are applicable. One of those  
12                  agreements very clearly expired by its own terms. The  
13                  second agreement, Judge, was thereafter amended after  
14                  it was initially issued, and it expired by its own  
15                  terms December 31, 2000, again, by amendment.

16                 However -- and on this Exhibit list I've  
17                 given you, Judge, I don't want to read them all off.  
18                 You will find that the first one -- the one that is --  
19                 the first one that expired is 9C941. This is the one  
20                 that Mr. Schwartz says in his brief that I didn't tell  
21                 you about because probably I was afraid if I told you  
22                 about it my argument would be moot. I had no such  
23                 fear, Judge. I didn't put it in there because it's  
24                 not pertinent or relevant. It expired -- it was for  
25                 the 1999 model year. It expired July 31, 1999 and was

1 not renewed.

2 Now, the second purchase order for the same  
3 part, 06948, and that is purchase order AC934, the  
4 factory assist contract issued to Nu-Tech was amended,  
5 and I've listened those various amendments. We also  
6 show with our Exhibit G that Nu-Tech shipped parts  
7 against those amendments, and those are the long  
8 detailed sheets that are the payment records. I have  
9 not included all of those because it's a two inch  
10 stack, but I just took a period of them which I think  
11 are representative up through December of 1999 showing  
12 those payments under that amendment, which is 580000B  
13 to show that payments were actually made. It takes  
14 the dispute out of that.

15 Now, the argument is made by the plaintiff  
16 again, well, Delphi never terminated the agreement as  
17 they were obliged to do in writing. I want to make it  
18 clear, Judge, it was never the intent of Delphi to  
19 terminate the agreement with Nu-Tech. It was the  
20 intent of Delphi to keep that agreement in place.  
21 They did, in fact, keep it in place. And when the  
22 sale was made to Rapid, a new purchase order amendment  
23 was issued to Rapid for part 0694, continuing that  
24 agreement until it was later terminated, and I put in  
25 the brief that last document, which is Delphi

1 amendment 003 issued January 15, 2000, where it says  
2 right on the face of it canceled, and that's how they  
3 do it.

4 Now, why would Delphi give Nu-Tech a  
5 purchase order for a part -- a requirements contract  
6 and then not order against it? Well, these contracts,  
7 whether they are factory assist, which 8C934 was, or a  
8 requirements contract, are all contracts that Delphi  
9 puts in place so that they can buy whatever parts they  
10 require. That testimony was obtained from Mr.  
11 Blackburn, Judge. It is undisputed.

12 Also, Mr. Schwartz says we'll read the  
13 agreements, you could read the contracts themselves  
14 within the four corners of the contract, and it will  
15 tell you what the requirements are. It does. On the  
16 bottom of the agreement it says we will ship -- we  
17 will give you releases, terms that Delphi uses, and  
18 then you will manufacture and ship against those  
19 releases. You have told us -- Nu-Tech, you have told  
20 Delphi you can make up to 16,000 parts a day.  
21 Plaintiff would like you to read that as meaning,  
22 well, they're going to buy 16,000 parts. That doesn't  
23 mean that at all. It means that if we need up to  
24 16,000 parts, you can produce that many parts for us,  
25 but we will tell you how many we need based upon our

1 own customer requirements from Chrysler, Ford, Toyota,  
2 General Motors, whoever else that are buying that  
3 product created to produce by Delphi for their  
4 customers. And, as I say, Mr. Blackburn's testimony  
5 on that point is refuted.

6 I might add at this point, Judge, that there  
7 are no affidavits provided by the plaintiff in  
8 response to anything that the defendant has asserted  
9 by means of these affidavits. And the rule is very  
10 clear as I read it, you just don't come in on an  
11 answer to a (C)(10) motion and say, well, read our  
12 pleadings, Judge, and listen to my argument, and  
13 hopefully on the basis of what I tell you, you may  
14 find a fact question. I think that's always the hope  
15 of people who don't have a basis for a response.

16 With respect to the promissory estoppel,  
17 Judge, we have outlined the law which I think more  
18 than elaborate detail of what the requirements are for  
19 a promissory estoppel claim. Also, it must be shown  
20 that the plaintiff has a legal entitlement -- or an  
21 equitable entitlement to this essentially equitable  
22 relief.

23 The first requirement -- and we have no  
24 disagreement apparently on the laws as I read Mr.  
25 Schwartz's brief. The first requirement is there must

1 be a promise. This promise, Judge, so-called is set  
2 out on page 10 of defendant's brief. And Mr. Cooper  
3 has testified that pretty much at the end of the  
4 production of 06941, when Delphi wanted to take its  
5 tools back, which it had an absolute right to do, it  
6 could make the part in-house or it could send the  
7 tooling to other companies for its use and  
8 convenience, or whatever, or it quit making the part,  
9 but they had a right to do that, and I don't think  
10 there's any dispute about that. But he says pretty  
11 much in at the end, when this 0694 -- when they wanted  
12 to take these tools back, we were told we were going  
13 to get a replacement for that job. And then I'm  
14 skipping over a little bit.

15 It says, who would have said that to you?  
16 I'm going to say probably Trainer. Well, Trainer  
17 Patrick (phonetic) was a buyer for Delphi.

18 When would that have been? Probably in the  
19 fall of '98.

20 Had you had other discussions with Delphi  
21 where they said they're going to be bidding out parts  
22 and we will put you on the bidder's list? We were on  
23 the bidder's list all of the time. And Mr. Cooper --  
24 and that's the promise, Judge. There was a  
25 conversation somewhere down the road we may give you



1 more replacement parts.

2 Now, on that story, Mr. Mailey again, who  
3 was the owner at the time, the majority shareholder,  
4 says, they did give us parts. And I think two things,  
5 number one, you cannot read -- number -- what I have  
6 cited here, we're probably going to send you some  
7 parts, as a promise. Also, Mr. Cooper understood that  
8 if parts were going to come to -- or new business was  
9 going to come to Nu-Tech, that Nu-Tech because it was  
10 first on a bidder's list, number two, that they would  
11 receive a request for quotation from Delphi with  
12 respect to a part, that request for quotation would be  
13 considered by Nu-Tech. Nu-Tech would then bid on it,  
14 on that part, and if that was a successful bidder, if  
15 it could prove to Delphi's satisfaction that it could  
16 make the part, make it in the quantities, and make it  
17 at the price that Delphi required, then a contract  
18 would be issued.

19 So, you cannot stand in one place and say  
20 the person told me they would give me some more parts  
21 or give us some replacement parts, and treat that as a  
22 promise where it is well known to you, the person who  
23 needs to rely on that promise, that that promise can  
24 only be fulfilled if there are other requirements met,  
25 and that is that Delphi needs the parts, that Delphi

1 issues the request for quotation, that Nu-Tech bids on  
2 that quote -- or request for quotation, and then that  
3 Nu-Tech is the low bidder on that quote. It simply  
4 does not meet the requirements of promissory estoppel.

5 So, with respect to that claim, Judge, I  
6 would summarize and say, first, it went with all of  
7 the assets if it never existed in the first place.  
8 Secondly, there was never any claim. Mr. Mailey, the  
9 owner, says there was never any claim based upon  
10 promises that would arise to the requirements of a  
11 promissory estoppel claim. That is unanswered by  
12 affidavit or by any other means. And, third, that on  
13 the face of it, the undisputed testimony shows that it  
14 is not a promise, and, number two, that that sketchy  
15 language, no matter how you look at it, is not  
16 something upon Mr. Cooper could have relied as the  
17 minority shareholder, a person essentially just simply  
18 working in the company, to -- basically for promissory  
19 estoppel.

20 I hope I didn't talk past my time, Judge.  
21 If I did, I apologize.

22 THE COURT: I have a couple of questions.

23 MR. LIPPERT: Yes, sir.

24 THE COURT: You're bringing motion under  
25 (C)(8) and (C)(10), is that correct?

1 MR. LIPPERT: Yeah. (C)(10), Judge, is --  
2 let me back up a little bit. With the promissory  
3 estoppel claim, it looks to me -- as I read the very  
4 simple elements of the plaintiff's complaint, it looks  
5 to me like a representation claim -- a  
6 misrepresentation claim, and as a matter of law --

7 THE COURT: My question has to do with --

8 MR. LIPPERT: Yes.

9 THE COURT: -- first, the (C)(8) motion,  
10 where is the complaint defective? What are you  
11 maintaining entitles you to a (C)(8) summary  
12 disposition?

13 MR. LIPPERT: It does not state a cause of  
14 action for promissory estoppel. It does not express  
15 the elements. And that's the limit of the (C)(8),  
16 Judge. All the rest of it that I'm raising is  
17 (C)(10). And I further state in that motion that you  
18 can't plead misrepresentation and then put the caption  
19 on it -- and it's captioned -- that count is captioned  
20 promissory estoppel, and change the nature of the  
21 cause of action.

22 It's a tough line to draw, you know, Judge,  
23 and the only way I can see to raise it, by way of a  
24 (C)(8) motion, is to say is that really what it  
25 purports to be? But if you look past that, and say,

1 well, I give them the benefit of the doubt, he states  
2 the cause of action for promissory estoppel, it does  
3 not meet -- it still doesn't pass mustard for the  
4 other reasons that I have stated.

5 The breach of contract claims are not (C)(8)  
6 motions, and nothing else in my brief is directed to  
7 that, Judge. They are all (C)(10), undisputed  
8 material facts as presented by the defendant establish  
9 that there is no breach of contract claim and no  
10 promissory estoppel claim.

11 I've also -- just to further clarify a  
12 little bit, I made the argument with respect to the  
13 economic loss doctrine, which Mr. Schwartz has  
14 answered, Judge, and that's because I read the  
15 promissory estoppel claim as a misrepresentation  
16 claim. I maybe didn't say that clearly enough in my  
17 brief. But if you find, Judge, as a matter of law  
18 that the promissary estoppel claim is properly  
19 alleged, and therefore no (C)(8) motion grant is  
20 applicable, you may ignore the economic loss doctrine  
21 argument, because they are tied together.

22 I, frankly, Judge, have trouble when I see  
23 those allegations, promissory estoppel and  
24 misrepresentation, which side of the line it falls on.  
25 You read the cases, and I don't really see a bright

1 line between them. At least I don't see it, maybe  
2 other people do.

3 THE COURT: Mr. Lippert, I may have some more  
4 questions for you, but right now I'm going to turn to  
5 Mr. Schwartz.

6 MR. LIPPERT: Thank you, sir.

7 MR. SCHWARTZ: Your Honor, can I use your  
8 blackboard?

9 THE COURT: Yes.

10 MR. SCHWARTZ: Only for part of it, because  
11 I just want -- I want to make sure we are all on the  
12 same page on the contract part of it. I will bring it  
13 out here. I just want to get to the contract part. I  
14 want to make sure we know --

15 THE COURT: There's two sides to that  
16 blackboard.

17 MR. SCHWARTZ: Do you want me to save this  
18 side for whatever you're using?

19 Good morning, Your Honor.

20 THE COURT: Good morning.

21 MR. SCHWARTZ: I will address the standing  
22 issue first, and then I want the blackboard because I  
23 want to talk about the contract.

24 But the standing issue I think is a major  
25 red herring that has come up here at kind of at the

1 last second. I would first suggest to you, Your  
2 Honor, if someone wants to file a motion for summary  
3 disposition as to standing, it's MCR 2.116(C)(5) that  
4 should be filed. That hasn't been done here. Okay.  
5 This is a (C)(8) (C)(10) motion. So, I don't think  
6 it's been properly pled.

7 But let's assume that it did, if you want to  
8 get to the substance of whether there is standing or  
9 not. Mr. Lippert doesn't cite any law to suggest that  
10 a party who maybe didn't have standing when a  
11 complaint was filed, but then remedies whatever that  
12 defect was before it's brought to the Court's  
13 attention, that the complaint is defective, that you  
14 have to dismiss it and start all over again, the  
15 things that he is suggesting for you to do. And  
16 either -- I think you couldn't find any law because  
17 that isn't the law. As a matter of fact, there is  
18 case law that says when you don't have standing  
19 initially, when you file the complaint, but you cure  
20 that defect before the Court rules on it, there's not  
21 a problem with standing.

22 The case I would cite -- I would cite you to  
23 two cases. The most recent of which is an unpublished  
24 case, but relies on a published case, but the most  
25 recent of which was a 2003 case. May I approach with

1 a copy of it, Your Honor?

2 THE COURT: Have you given it to Mr. --

3 MR. SCHWARTZ: I will give it to Mr.

4 Lippert.

5 This is all in the reply brief that I didn't  
6 have a chance to answer in writing, or I would have  
7 addressed it before.

8 THE COURT: Okay.

9 MR. SCHWARTZ: In this case, Your Honor,  
10 Thomas versus Costa, what happened was, it involves a  
11 corporation and some shareholders who were suing, and  
12 there was an -- there was an issue raised by -- at the  
13 trial level that the corporation at the time the  
14 lawsuit was filed was dissolved. It wasn't in good  
15 standing with the State of Michigan, and that was  
16 true. It didn't have standing under the corporate  
17 laws in the State of Michigan when the complaint was  
18 filed. The case went forward, and before motions for  
19 summary disposition were filed, they went and they  
20 cured that defect, and became a corporation in good  
21 standing in Michigan. The trial Court, in granting  
22 the motion for summary disposition, said you didn't  
23 have standing when the case was filed. The appellate  
24 Court said the trial Court erred on that issue. They  
25 affirmed them for other reasons. But what the Court

1 of Appeals -- this is a 2003 case -- said is that the  
2 trial Court erred in granting the motion for summary  
3 disposition because the plaintiff was able to correct  
4 the defective filings which led to their improper  
5 standing before the Court issued its rulings on the  
6 summary disposition motion, and you can read this case  
7 when you get it, Your Honor.

8 This case relies on another case, a  
9 published case, called George Morris Cruises versus  
10 Irwin Yacht Marine Corporation, 191 Mich App 409.  
11 Again, Your Honor, can I approach with a copy of that?

12 THE COURT: You may.

13 MR. SCHWARTZ: What is interesting about  
14 this case, Your Honor, is it goes even further than  
15 the case I just cited to you. This is a partnership  
16 case. And at the time -- he will appreciate that  
17 greatly. So, thank you.

18 At the time -- in this case it was a  
19 partnership, they did not file a certificate of co-  
20 partnership at the time the complaint was filed. So,  
21 in response to the complaint, the defendant filed a  
22 motion for summary disposition. No standing. You  
23 weren't a property partnership in Michigan. The trial  
24 Court granted the motion for summary disposition. And  
25 what the clever plaintiffs then went and did is they



1           went and registered the certificate between the date  
2           the trial Court granted the summary disposition motion  
3           and the order of dismissal.

4                       So, the motion had already been granted by  
5           the Court, and they went to try to correct it before  
6           the order -- before the case was officially dismissed.  
7           The trial Court said, nice try, but it's been  
8           dismissed. You didn't have standing when the  
9           complaint was filed. And the appellate Court, in this  
10          case it's published, said, they corrected the defect.  
11          They corrected the defect before the dismissal. They  
12          got standing. They can go ahead with the cause of  
13          action. And that's what the law is in Michigan.

14                      So, the assignment that we presented to you,  
15          that you have as Exhibit B, the assignment I read a  
16          little differently than Mr. Lippert, it says that --  
17          and this is between Nu-Tech and RPT. It says that at  
18          the time of that asset purchase transaction back in  
19          '99, neither one of us ever intended that any cause of  
20          action was being transferred as part of that. If  
21          anybody wants to try and asks what the two parties  
22          thought, that wasn't our intention. But if this Court  
23          somehow reads that document to say that is what  
24          happened, we're giving it back to Nu-Tech.

25                      So, as I stand here in front of you, Your

1 Honor, Nu-Tech possesses the cause of action. They  
2 have standing to pursue the claim. And it -- and with  
3 respect to the issue about Mr. Mailey and Mr. Cooper,  
4 there is no question that Mr. Cooper is the 100  
5 percent shareholder.

6 So that the Court is aware, you've heard  
7 about Mr. Mailey and his affidavit, the reason he has  
8 now turned on Mr. Cooper, it's a matter of public  
9 record with this Court, there has been litigation  
10 between these two gentlemen. Mr. Cooper has a  
11 judgment against Mr. Mailey for one half of a \$1  
12 million. That's why Mr. Mailey now is not going to  
13 cooperate with Nu-Tech, or with Mr. Cooper, or with  
14 anything else that he is doing. That is a matter of  
15 public record.

16 And just -- I will just address -- so, I  
17 think on its face this is a red herring. We've got  
18 the cause of action. If the Court wanted to get into  
19 the intent because it thought that the transaction  
20 back in '99 was ambiguous, the reason why that  
21 transaction I argue is ambiguous is because it says  
22 that we're selling all of the assets, and it lists the  
23 assets, and what it says is you get everything except  
24 what is excluded. Then you go down to what the  
25 excluded assets are, and the excluded assets says the

1 things that are excluded are the things that aren't  
2 specifically listed as assets in the agreement.

3 So, so the two provisions point at another  
4 without defining whether a cause of action is being  
5 transferred. When you look at the assets themselves,  
6 they don't list causes of action. They list other  
7 things, but not that.

8 So, I think the transaction on its face,  
9 that transaction is ambiguous just because of the way  
10 it is written. You have both parties to the  
11 transaction saying it was never our intent that the  
12 cause of action was being transferred, and in the  
13 event the Court thinks, well, no, I think the  
14 agreement on its face it was, you now have the  
15 assignment going back.

16 So, I think the standing is a red herring.  
17 Nu-Tech has standing as we sit here to proceed to  
18 trial.

19 Now, with respect to the contracts, and the  
20 reason I wanted the blackboard is because I just want  
21 the Court to understand the contracts and the one that  
22 is at issue. The first contract, which they attach to  
23 their brief, is the one that was signed in November of  
24 '97, and it's the 8C934. That contract, if you look  
25 on -- and the way you have to read this, Your Honor,

1 if you look at the very -- first, in that looking on  
2 the first page, we know it's a requirements contract.  
3 That's a term of art legally. And I will address that  
4 in a moment. So, I'm not -- the fact that Mr.  
5 Blackburn may testify a certain way, or my client may  
6 testify as to what they think it is, that's a legal  
7 term of art, and it has legal connotations, regardless  
8 of what anybody else may think. This is a  
9 requirements contract. It's signed November 17<sup>th</sup>, '97,  
10 that's on the first page. You have to -- and at the  
11 beginning it talks about the part number. But the  
12 important page, if you look, is the very last page of  
13 this document.

14 THE COURT: What exhibit are we dealing with?

15 MR. SCHWARTZ: This was attached to your  
16 brief, Mr. Lippert.

17 MR. LIPPERT: Plaintiff's -- excuse me,  
18 Judge. Defendant's Exhibit A.

19 MR. SCHWARTZ: Defendant's Exhibit A. And I  
20 have another copy if the Court doesn't have it in  
21 front of it.

22 If you turn to the very last page, it says  
23 some important things. It identifies the part number,  
24 the 06 -- if you can look at the last four numbers,  
25 the 0694, that's what Mr. Lippert and I have referred

1 to as the 0694. You look under -- all the way down to  
2 the date effectiveness, because this is when the  
3 contract is going to run, and it makes it clear that  
4 the contract starts from November of '97 and it  
5 expires July 31<sup>st</sup>, 1998. And it talks about a drawing  
6 date number, the drawn was 3796. So, that's the drawn  
7 that was submitted that led to this requirements  
8 contract.

9 I think the evidence is clear, and I don't  
10 think we're disputing this, that this was the first of  
11 this type of contract between General Motors and Nu-  
12 Tech. It was a factory assist contract which we see  
13 on the first page, and that is important. It says on  
14 it on the very first page, factory assist. It's on  
15 the second line right under -- right under where they  
16 are adding this part number. And the reason for that,  
17 as Mr. Lippert I think accurately represents, is there  
18 was -- GM was doing some of this in-house. They  
19 wanted Nu-Tech to help produce this part on their own,  
20 because they were mentoring Nu-Tech, and I attached  
21 that as exhibit, I think Exhibit D. GM was trying to  
22 grow this business. Mr. Mailey is an African-  
23 American. He was a 51 percent owner. Mr. Cooper was  
24 a 49 percent owner. Mr. Cooper owned another company  
25 here in Flint, a company called Fabricating Engineers.

1 It was at one time one of the largest conveyor belt  
2 manufacturer companies in the world. GM was happy to  
3 put these two gentlemen together. They wanted to  
4 increase their minority business. And Nu-Tech, in  
5 fact, did grow with GM's help. At one point they were  
6 up to about 70 to 75 employees. So, they gave them  
7 this part, a temporary part, that was the first  
8 contract.

9 Then in March of 1998, this is an exhibit  
10 Mr. Lippert has seen. I did not attach this to my  
11 brief, and I know it's been produced in this case. I  
12 would just like to approach the Court so you  
13 understand the chronology of this.

14 With the contract expiring in July of 1988,  
15 Nu-Tech submitted a quote for a number of parts. I've  
16 handed you this March 5<sup>th</sup>, 1998 letter. The very first  
17 part number is the 2560694, and again they are quoting  
18 the price of \$1.86, and different volumes they're  
19 going to run -- that they would like to run if Delphi  
20 would give them a contract.

21 What occurs next is the purchase order that  
22 I think is at issue and will be an issue in front of  
23 the jury in this case, Your Honor, and that is the  
24 purchase order that is 9C941. This is Exhibit A to  
25 plaintiff's response brief, and when you compare it

1 with the prior one, you'll see the differences. The  
2 9C941, this is my Exhibit A, if you look at the first  
3 page of it, Your Honor, it indicates that this is  
4 issued June of 1998. So, this is issued about a month  
5 before the prior one expires, about two months after  
6 you saw the quote. It's called again a requirements  
7 contract. This is on page one, and again that is a  
8 legal term of art under the UCC. You will notice that  
9 the factory assist language that we saw in the first  
10 contract is now gone because GM had now made the  
11 decision that we're going to let Nu-Tech manufacture  
12 this part under a requirements contract, meaning they  
13 are going to get all of the requirements that we have  
14 for this part, Nu-Tech is going to manufacture it for  
15 us. That's what a requirements contract is. And  
16 again I'm going to talk about the law in a minute.

17 If you now -- that's on the first page. Of  
18 significance, Your Honor, if we now turn to last page,  
19 similar to what we did before -- I'm sorry, the second  
20 to the last page, the second to the last page, it  
21 lists the different parts that are included as part of  
22 this purchase order. At the very bottom is the  
23 25160694, that same part, and we can see it's the same  
24 price. But now you look at the effective date. They  
25 have now extended the contract beginning August 1<sup>st</sup>,

1 '98. So, this is a PO. Remember, the prior one ended  
2 July 31<sup>st</sup>. So, now we're onto a new purchase order  
3 that's going to begin the following day, August 1<sup>st</sup>,  
4 1998, and it will expire July of 1999.

5 And then next -- the very last category, the  
6 drawing date is now 3/17/98, that is a week after the  
7 quote that I handed you a minute ago, which shows you  
8 the drawn was off of this quote that led to this  
9 purchase order. So, we know it's not the same drawn  
10 as the earlier one.

11 This contract goes into effect. It goes  
12 into effect we know in June of '98. This is right  
13 before GM had a strike in the summer of 1998, and GM  
14 as part of growing the business with Nu-Tech is giving  
15 them this additional work. If you look at -- I gave  
16 you, Your Honor, and I won't pull it out again --  
17 Exhibit D, the mentoring arrangement. This is an  
18 internal GM document that explains how they think Nu-  
19 Tech is going to grow because they are giving them  
20 this type of work, along with some other parts. It  
21 wasn't just on this part. But this is the purchase  
22 order that's in dispute.

23 The next contractual thing that happens is  
24 that GM spins off Delphi, and Delphi takes over  
25 servicing this contract. I have --- we have a -- the



1 first amendment, and this is in attention again to Mr.  
2 Lippert's brief and I don't have the exhibit in front  
3 of me, it is the -- it's the amendment -- the first  
4 amendment on August 1<sup>st</sup>.

5 Do you remember which exhibit that is, Mr.  
6 Lippert?

7 MR. LIPPERT: A.

8 MR. SCHWARTZ: A?

9 MR. LIPPERT: Part of A.

10 MR. SCHWARTZ: Okay. Part of A.

11 If you look at that -- because it's  
12 important that you understand that amendment. All  
13 right. If you look in the upper -- if you look in the  
14 upper right hand corner of this amendment, because the  
15 question becomes is this amending this factory assist  
16 one, or this amending the purchase order that's in  
17 place? That's where Mr. Lippert and I are disagreeing  
18 with what we have submitted to you. How you can tell  
19 on the face of the document which one it is amending,  
20 in the upper right hand corner, this amendment is  
21 issued August 17<sup>th</sup>, 1998.

22 THE COURT: What exhibit are we on now?

23 MR. SCHWARTZ: This is Mr. Lippert's Exhibit  
24 A.

25 MR. LIPPERT: Judge, I confused things I'm

1           afraid a little bit. I should have put A1, A2, A3.

2                   I put the series of contracts that relate to  
3           that part. All of it is Exhibit A, along with the  
4           terms and conditions. So, you will find the order  
5           there -- the purchase order -- the GM purchase order,  
6           and then the Delphi amendments, and then the last item  
7           is the terms and conditions which would amend  
8           applicable to the amendment issued after September of  
9           1999.

10                   MR. SCHWARTZ: Do you want another copy of  
11           it?

12                   LAW CLERK: You might want to approach just  
13           to make sure that you're looking at the same thing  
14           he's looking at.

15                   MR. SCHWARTZ: Okay. It's marked August  
16           17<sup>th</sup>, of '98. Mr. Lippert can show him. It should be  
17           the one dated August 17<sup>th</sup>.

18                   MR. LIPPERT: (Inaudible). Then I put a  
19           piece of paper in. That's the first one, then they  
20           sort of follow.

21                   MR. SCHWARTZ: Yes. That's the one I'm now  
22           talking about.

23                   MR. LIPPERT: Then that's two pages, and then  
24           the next amendment is down --

25                   MR. SCHWARTZ: Yeah. I'm going to talk

1 about two amendments, Judge, and I think they're both  
2 in order. I think Mr. Lippert is correct.

3 This first amendment, Your Honor, if you  
4 look in the upper right hand corner -- I hope it  
5 printed out in yours like what I have -- it shows that  
6 this amendment was issued on August 17<sup>th</sup>, '98. Now, if  
7 you look at these contracts, Your Honor, the only  
8 contract that is in play at that point is the 9C941.  
9 The prior one had expired July 31<sup>st</sup>. There is nothing  
10 to extend at that point. There is nothing to change  
11 at that point because that one is already done.

12 So, it's issued August 17<sup>th</sup>, 1998. And all  
13 this amendment did, Your Honor, was change this from  
14 GM to Delphi. And how we know that this isn't an  
15 extension of the first contract, the way Delphi is  
16 suggesting, if you look under the amendment reason,  
17 Your Honor, they list on this amendment that the  
18 reason this is a new contract line item. It doesn't  
19 say it's extended anything, or nothing like that, and  
20 I'll show you why that -- why that makes a difference  
21 in a moment. If you also see the amendment number in  
22 the upper right hand corner underneath the date, it's  
23 amendment number 000, because it's not amending  
24 anything. It's just putting this on Delphi paper.  
25 That's my suggestion, and I think that's a fair

1 reading of this document.

2 If we now turn -- and this is for the 0694  
3 part, and all of the other -- everything else stays  
4 the same. There's nothing else different from the  
5 9C941. That's the first amendment. And it mirrors  
6 the date of contract, August 1<sup>st</sup>, of '98 through July  
7 31<sup>st</sup>, 1989.

8 If we then turn to the second amendment,  
9 Your Honor, which I think is the next one in Mr.  
10 Lippert's package, what I think is of most  
11 significance -- if you look at the amendment reason  
12 for the second amendment, amendment number two, it  
13 says expiration date extended.

14 So, unlike the first amendment, this one  
15 explains what it is doing. We are now extending the  
16 expiration date. If amendment one was extending the  
17 factory assist contract, it would have said that, at  
18 least if we're going to take Delphi at their word of  
19 how they draft contracts. This is their form  
20 contract. We didn't draft this. What this contract  
21 did, Your Honor, it extended the expiration date, this  
22 amendment now until December 31<sup>st</sup>, 2000.

23 So, unlike the prior one which just mirrored  
24 the 9C941 that is at issue, it's now extended it from  
25 August 1<sup>st</sup>, '98 through December of 2000. They

1 extended it for another year and a half. And this one  
2 was issued in May of 1999.

3 The last thing I'll say about this, and then  
4 I will go back into my brief is at the time they  
5 issued this one, Your Honor, this is May of 1999, this  
6 is after they pulled their tools, they being Delphi,  
7 and started causing all of this catastrophic harm to  
8 Nu-Tech. Our promissory estoppel claim is you told us  
9 to stay afloat, to keep up all of this overhead  
10 because you're sending another part, you were either  
11 going to give us back this one, or another part,  
12 that's what Mr. Cooper testified to. We tried to stay  
13 afloat. You are our mentor. You're telling us that.  
14 And, in fact, you're giving us a contract -- you are  
15 extending our contract another year. You are staying  
16 contractually obligated to us on this contract that  
17 was really what was keeping our business going and  
18 growing our business. This is independent proof of  
19 the promissory estoppel of what we're being told in  
20 May of 1999.

21 So, these are the contracts at issue, Your  
22 Honor. I think it's clear, if you look at the  
23 contracts. The purchase order 9C941, that's the  
24 contract that we're alleging was breached. It's not  
25 the factory assist contract. And then it's amended.

1 Now, what does a requirement contract mean?  
2 Mr. Lippert suggests that that just means we will give  
3 you what we want to give you, something to that  
4 effect, and I'm not quoting him as eloquently as he  
5 speaks. But the -- a requirements contract, Your  
6 Honor, is defined by the UCC, and I presented to you  
7 case law that explains what it is. And this is the  
8 Tigg (phonetic) case that I attached, 962 F 2ND 1119,  
9 and I think that's important, Your Honor, because that  
10 case dealt with jury instructions. When dealing with  
11 a requirements contract, there's an argument over the  
12 type of jury instruction that was read to the jury --  
13 that was given to the jury.

14 MCL 440.2306 states, that's the law on  
15 requirements contract, that the seller, meaning Nu-  
16 Tech, must satisfy the buyer's actual requirements as  
17 they occur in good faith. The other thing that we  
18 know, Your Honor, and I won't go back to it, but if  
19 you look again at the 9C941, the last page, there is a  
20 column that talks about what percent of the business  
21 of GM's we are going to do for this part, and on that  
22 page it says we are being given 100 percent of their  
23 business for that part.

24 The reason why I think that is significant,  
25 Your Honor, I also cited you the Advanced Plastics

1 case, another case talking about requirements  
2 contract. That case explains that you can have  
3 nonexclusive requirements contracts. There are  
4 certain types of language that you need to include in  
5 your contract if you want to make it nonexclusive, but  
6 they potentially exist. That's not -- we don't have  
7 that case here.

8 We have a requirements contract for 100  
9 percent of the business. So, what that means to the  
10 seller, like Nu-Tech, is you must be prepared to  
11 handle 100 percent of GM and Delphi's production needs  
12 for that part. We know in this case factually, and I  
13 don't think it's in dispute, that we were producing  
14 100 percent up until the time in late 1998, early 1999  
15 -- GM settles their strike, and as part of their  
16 strike, they decide, we're taking our tools back from  
17 Nu-Tech and we're going to deal with this part in-  
18 house.

19 They are not suggesting to you, Your Honor,  
20 that they didn't need to produce this part anymore.  
21 They're not suggesting to you that they went out to  
22 some other source to have the part manufactured  
23 because that isn't the case. They continue to  
24 manufacture the part. They did it in-house. But  
25 under MCL 440.2306, they can't do that. That's what

1 requirements contracts are. And they're harsh  
2 contracts for sellers like my client, because they've  
3 got to be prepared to meet 100 percent of the needs as  
4 they are notified of it, and that's what didn't happen  
5 here.

6 In reading Mr. Lippert's reply brief, I  
7 really think Your Honor can grant partial summary  
8 disposition to Nu-Tech on liability on its breach of  
9 contract claim under 2.116(I)(2), because Mr. Lippert  
10 concedes that had Delphi wanted to terminate the 9C941  
11 contract, they had to do it in writing. He concedes  
12 they didn't do that in writing. There is no argument  
13 that the parts were not being -- became produced in-  
14 house and not at Nu-Tech. That's a breach of a  
15 requirements contract. Period.

16 We differ on the damages significantly, and  
17 I don't think you could rule on that. But I think  
18 based on his reply brief and the documents you've been  
19 given -- I heard Mr. Lippert say we don't have  
20 affidavits. You've got these documents. This is the  
21 evidence, and that's what we're required to give to  
22 you under MCR 2.116(C)(10) legally. Legally, I think  
23 you can enter a motion for partial summary disposition  
24 on the breach of contract claim as to liability  
25 against GM and Delphi because they broke the



1 requirements contract clearly. I don't think there is  
2 any issue of fact as to that.

3 The Tigg case also says, Your Honor, that if  
4 you want to breach, you have to do it in good faith,  
5 which is a jury question. And GM just says we did it  
6 to do want we wanted to do internally to deal with our  
7 labor issues in settling the strike. That's the  
8 contract claim that we have, Your Honor. And, you  
9 know, we may differ as to damages. And Mr. Lippert  
10 argued in his brief, well, we later went and we sold  
11 our company to RPT afterwards in December of '99.  
12 That's all true, because after they broke the  
13 contract, they told us -- and this gets into the  
14 promissory estoppel -- they told Mr. Cooper, hey,  
15 we're going to get your replacement part. We're your  
16 mentor. We know what we did. We're going to get you  
17 a different part. Keep the operations going. My  
18 client did.

19 You see in May of 1999 they issued a second  
20 amendment to the 0694 contract, extending it another  
21 year, the requirements contract, meaning, you better  
22 be able to deal with all of our -- 100 percent of our  
23 volume. We did. By September -- and in 1998, Your  
24 Honor, I produced to you our tax returns. We made a  
25 half of a million dollars in profit in that year, the

1 year that we had this contract in place, in 1998. You  
2 have that as one of our exhibits.

3 By 19 -- once they pull these tools, they  
4 killed the business. And Delphi knew they killed the  
5 business, and by that I mean -- I attached, Your  
6 Honor, as my Exhibit G, internal memoranda that Delphi  
7 produced in September -- well, let me back up of what  
8 happened here.

9 September of 1999, Delphi sees that Nu-Tech  
10 is in trouble and Nu-Tech is not going to make it as a  
11 (inaudible). They bring in a company, BBK, to see if  
12 they can solve the issues, so at least Delphi and GM  
13 aren't hurt. They help facilitate our fire sale of  
14 our assets. But in looking at their internal  
15 memoranda, they admit that what was catastrophic to  
16 my client's company was when they broke this contract,  
17 when they decided to bring the tools in-house.  
18 Catastrophic, their words. They were aware. Delphi's  
19 legal referenced in one of their memos, well, we  
20 haven't heard yet whether they're going to sue us, and  
21 that's Mr. Schwartz's words, paraphrasing. They knew  
22 this was a legal -- potential legal problem for what  
23 they did, and that's also attached as my Exhibit G.

24 THE COURT: When did they do that?

25 MR. SCHWARTZ: They took -- there was two --

1 what happened, Your Honor, when they first gave us the  
2 factory assist, they gave us two of their tools. They  
3 put it into our plant. And I have both of the  
4 consignment orders. One came in December of '97 and  
5 one I think was January of '98, or maybe it was  
6 November of '97 and December, about a month apart.  
7 They put two tools in our plant, and we started  
8 churning out the 0694.

9 After they settle the strike, in August,  
10 September of '98, as part of the settlement they  
11 decide we're taking the tools back, and we're going to  
12 produce this part in-house, and I don't think there's  
13 a dispute that that's what happened. They took the  
14 first tool back in either September or October of '98.  
15 And if you look at our production numbers, they got  
16 cut in half. The second tool they take back in  
17 January of 1999, and that's when we're no longer  
18 producing 0694. At that point we're told we're going  
19 to get a replacement part, or in May of 1999 they  
20 extend the contract. We're told maybe you're going to  
21 get the part back. Keep up your overhead. Keep up  
22 your 70 employees, and all this plant space that  
23 you've taken on, all of the new equipment you bought.  
24 That's factually what happened. And once those tools  
25 were gone, we couldn't manufacture the part anymore,

1 and they didn't give us any -- they didn't give us any  
2 more orders.

3 As it relates to the promissory estoppel  
4 claim, Your Honor, this is where I differ from Mr.  
5 Lippert. There is a difference between a fraud claim  
6 and a promissory estoppel claim. Fraud means that I  
7 know a current fact, and I lied to you about that  
8 current fact, and you relied upon that lie to your  
9 detriment. That's a fraudulent misrepresentation  
10 claim. That's not what we pled in the complaint.

11 The complaint was promissory estoppel. If  
12 Delphi was -- or didn't understand our claim -- I  
13 think your question from the bench was about this C8,  
14 and Mr. Lippert suggested he just didn't understand  
15 it. They have a very easy remedy under the court  
16 rules, you file a motion for a definite statement if  
17 you don't understand it. We list -- I mean, we  
18 labeled what the claim was, and I think we've clearly  
19 pled promissory estoppel on its -- according to what  
20 we need to, as far as the elements go.

21 THE COURT: Point me to the elements in count  
22 two.

23 MR. SCHWARTZ: I do not have my complaint in  
24 front of me.

25 MR. LIPPERT: I can give you one.

1 (Inaudible).

2 MR. SCHWARTZ: You know, wait a second. Wait  
3 a second. I do have it. I do have it. I have my  
4 trial book. I'm looking at my exhibits. Let me just  
5 see -- okay. I do have it, Your Honor.

6 MR. LIPPERT: You've got it?

7 MR. SCHWARTZ: Yeah.

8 These were misrepresentations that they made  
9 --

10 MR. LIPPERT: Just a minute. Just a minute.  
11 Do you want me to pull mine out, Judge?

12 MR. SCHWARTZ: I'm sorry.

13 THE COURT: No. I have it.

14 MR. LIPPERT: I beg your pardon?

15 THE COURT: I have -- I'm looking at the  
16 complaint.

17 MR. LIPPERT: I see.

18 MR. SCHWARTZ: Okay.

19 THE COURT: Count two.

20 MR. SCHWARTZ: Correct.

21 In paragraph 12 we talked about -- we  
22 identify the promises that were given to us, the  
23 current promises of what we needed to do because of  
24 them taking back the tool. We indicated that we think  
25 that they were false, or at least they were made

1 recklessly with the intent that we should rely on it.  
2 We did rely on it, in paragraph 14, and we suffered  
3 damages because of it.

4 Under the Schmidt case that I cited in my  
5 brief, those are the elements for promissory estoppel.  
6 A promise -- that a promise (inaudible) should have  
7 reasonably been expected to induce action, which, in  
8 fact, produced reliance, which led to damages.

9 So, I believe it's pled in the complaint.  
10 It was -- we've gone through discovery. Mr. Lippert  
11 has taken discovery on this issue. We've presented  
12 evidence that supports that, if you look at the -- if  
13 you look at the facts in the light most favorable to  
14 us, i.e. Mr. Cooper's testimony, the amendment that  
15 happened in 1999, you've got evidence of the promise,  
16 what we did in reliance upon the promise, and the harm  
17 that we have suffered.

18 I think all of those facts are in front of  
19 you, all the evidence is in front of you. We've pled  
20 it. We've gone through discovery on it, and the  
21 evidence is in front of you. If the Court thought the  
22 way that it is pled is not clear enough, you can -- I  
23 don't have my court rules in front of me -- the  
24 pleadings are -- can be amended to conform to the  
25 evidence at any time, even if the case is submitted to

1 the jury. Again, I don't have the court rule in front  
2 of me, but I know there's a rule that states that the  
3 evidence that is presented -- the pleadings can be  
4 modified to conform to the evidence that has been  
5 presented. This issue -- this case is three years  
6 old, Your Honor, and we've been in front of you ready  
7 for trial twice. This isn't anything new. This  
8 isn't any surprise. Mr. Lippert's done his discovery  
9 on these claims. He asked the plaintiffs point blank,  
10 that's why you've got the deposition testimony of Mr.  
11 Cooper. And I believe that claim has been pled.

12 THE COURT: Okay.

13 MR. SCHWARTZ: The damages are a little bit  
14 different than the contract.

15 That was the other thing they argued in the  
16 brief, that we're just being duplicative, and it's  
17 not, Your Honor. These are two separate things that  
18 we're arguing. The contract breach is 9C941. The  
19 promissory estoppel is what happens after they  
20 breached that caused this additional harm.

21 THE COURT: Thank you, Mr. Schwartz.

22 MR. SCHWARTZ: Thank you, Your Honor.

23 MR. LIPPERT: Mr. Schwartz has given you  
24 plaintiff's Exhibit 5, the March 8<sup>th</sup> letter. There is  
25 no follow up to that, Judge. As to whether Delphi

1 received it, acted on it, issued an order respecting  
2 that document. So, I don't know why it's before the  
3 Court. But it can't lead us in any direction, I would  
4 submit.

5 Secondly, Your Honor, Mr. Schwartz says that  
6 my motion with respect to Nu-Tech not being the proper  
7 party does not have legal standing, is inappropriately  
8 brought, that I should have brought it under another  
9 section that says that the party -- excuse me -- is  
10 not the proper party in interest is how I brought it.  
11 That's a bit confusing, Judge. Before I filed the  
12 motion, I did the research that deals with that  
13 subject, and when company -- or excuse me -- if a  
14 lawsuit is brought by a person on behalf of a minor  
15 and does not have that representative capacity  
16 established in law, they do not have legal standing to  
17 bring the claim.

18 The two cases cited by Mr. Schwartz have to  
19 do -- the one with a corporation, that it was not in  
20 existence, and, because it was not in existence, did  
21 not have -- did not become a legal person, therefore  
22 could not bring a lawsuit. However, the cases -- and,  
23 unfortunately, I did not foresee this issue, Judge, or  
24 I would have brought the cases, make a very clear  
25 distinction that the kind of motion that I have filed



1 is that they are not a proper party in interest. It  
2 doesn't have to do with Nu-tech not being a  
3 corporation.

4 Interestingly, Judge, right at this time,  
5 Nu-Tech is not in good standing in the State of  
6 Michigan. So, the case that's cited by Mr. Schwartz,  
7 if Nu-Tech had been disenfranchised, then, of course,  
8 I would base my motion upon that it does not have  
9 legal standing to bring it. When I checked this week  
10 to see what their standing was with the Michigan  
11 Corporation Security Commission, they haven't been in  
12 good standing now for a year. However, that does not  
13 preclude it from maintaining an action, or it does not  
14 preclude it from being sued, if it ought to be sued as  
15 a defendant.

16 So, if there is any thought given by the  
17 Court for finding that I have not cited the proper  
18 court rule for bringing that motion, I would ask that  
19 I be given a short opportunity, Judge, next week to  
20 give you those cases that I have on my desk.

21 THE COURT: Mr. Lippert, did General Motors  
22 breach the requirements contract?

23 MR. LIPPERT: No, sir.

24 He would like you to believe that the  
25 requirements contract means that you will buy 100

1 percent of our capacity, or everything you need. I  
2 will give you a simple example, Judge. I run a  
3 trucking company, and I'm going to do cross country  
4 trucking, and I'm going to do north to south trucking.  
5 So, I go and -- I have 10 trucks. So, I go to fuel  
6 suppliers across the country, and I say to those fuel  
7 suppliers, I have 10 trucks. They all use 1000  
8 gallons, or 500 gallons of gasoline. It doesn't  
9 matter. So, I say they may stop at your truck stop on  
10 a given day, they may come one at a time or they may  
11 come 10 at a time. I want to know that you have the  
12 capacity to meet my requirements to fill those trucks  
13 if we stop, and, if we do, we will pay you a \$1.86 a  
14 gallon. And the truck stop says we can't do that, or  
15 they say, yes, we can do that. Then I give them a  
16 requirements contract.

17 Now, it's undisputed in this case, Judge, if  
18 there is ambiguity, and Mr. Schwartz seems to be  
19 raising the ambiguity now that he wants to avoid -- if  
20 there is ambiguity, Judge, read what Mr. Blackburn  
21 said.

22 THE COURT: I'm not following what you said,  
23 or what you are saying. Are you --

24 MR. LIPPERT: Yes.

25 THE COURT: -- let's forget the

1           hypotheticals.   And let's deal with the facts in this  
2           case.

3                   MR. LIPPERT: Okay.

4                   THE COURT: Did you -- did General Motors  
5           give Nu-Tech all of the business?

6                   MR. LIPPERT: No. They were making them in-  
7           house too, Judge. They had three sets of tools, and  
8           they put two sets of tools over at Nu-Tech at  
9           different times.

10                  THE COURT: Now, are you saying that that was  
11           the circumstance when they entered into this contract  
12           for November, '97?

13                  MR. LIPPERT: Yes, sir. They had three sets  
14           of tools.

15                  THE COURT: So, throughout all of the dates  
16           that pertain here, do I understand that General Motors  
17           was producing some of these parts, as well as Nu-Tech?

18                  MR. LIPPERT: They may have, Judge, or they  
19           may not have been. It depended upon what their needs  
20           were, what the requirements were. If they couldn't  
21           get enough parts from Nu-Tech with their capacity that  
22           was specified, they had the right -- excuse me -- to  
23           make those parts in-house, or they had the right to  
24           put the tooling down the street, if they wanted to do  
25           so.

1 THE COURT: So, why did they call it a  
2 requirements contract?

3 MR. LIPPERT: It's a term of art used, Judge,  
4 to say that these are our requirements. This is how  
5 many parts we need. We need from you possibly up to  
6 16,000 parts a day. Do you have the capacity? And  
7 Nu-Tech says, yes, we have the capacity. So, they  
8 issue a purchase order, or an amendment saying you may  
9 be called upon to produce 16,000 parts. But as Mr.  
10 Blackburn says and as Mr. Mailey says in his  
11 affidavit, both of which are unanswered by anybody  
12 except Mr. Schwartz, Judge, both of those people, both  
13 of those witnesses under oath have said it means they  
14 get what they want against a release, depending upon  
15 their business needs, and it can be 10, it can be  
16 none, or it could be 10,000. That's undisputed,  
17 Judge, except by Mr. Schwartz.

18 Now --

19 THE COURT: Gentlemen, thank you. I'm going  
20 to leave the bench here for a few minutes, and I will  
21 be back either with a decision or some direction, one  
22 or the other.

23 MR. LIPPERT: Thank you, sir.

24 THE CLERK: All rise.

25 (At 11:08 a.m., court recessed)

1 (At 11:28 a.m., court reconvened)

2 THE COURT: Mr. Lippert, I have another  
3 question for you. I'm looking at plaintiff's Exhibit  
4 A, I'm sure it's in yours as well, which is the  
5 purchase order for 9C941.

6 MR. LIPPERT: Yes, sir.

7 THE COURT: And on the first page, it's  
8 titled requirements contract. See where I'm  
9 referring?

10 MR. LIPPERT: Yes.

11 THE COURT: Then go to the last two pages of  
12 the purchase order, and right in the middle, where it  
13 says approximate percentage of business, and there is  
14 a column that shows 100 percent for these items.

15 MR. LIPPERT: Yes.

16 THE COURT: Now, tell me what that means in  
17 the context of your argument.

18 MR. LIPPERT: It means this, Judge, that  
19 that's -- the 8C934, Exhibit A, is the factory assist.  
20 You have to read the first page. Can I come up and  
21 show you?

22 THE COURT: Well, let's talk about it in the  
23 context of --

24 MR. LIPPERT: Of the 100 percent?

25 THE COURT: The plaintiff says we made a

1 deal that General Motors was going to buy everything  
2 from us. You're saying, well, no, that's not true.  
3 We had some tooling and we're -- General Motors may be  
4 doing this along with you. How do you reconcile that  
5 with this contract language?

6 MR. LIPPERT: It's 100 percent of what they  
7 need on a factory assist basis, as Mr. Blackburn says  
8 and Mr. Mailey says in their depositions, Judge -- or  
9 in their sworn testimony, 100 percent.

10 And the only thing contradicting that, as I  
11 said before, is Mr. Schwartz, who would like you to  
12 believe that that means we will buy 100 percent of  
13 your production, and that's not what it means.

14 Judge, if General Motors didn't have  
15 customers buying those parts that are incorporated in  
16 with the other product, they wouldn't need anything,  
17 and that's why they write them as requirements. We  
18 will buy our -- what we require, or our production  
19 needs on a factory assist basis.

20 THE COURT: Okay.

21 I'm --

22 MR. LIPPERT: I was fearful, Judge, that  
23 there might be confusion about that. That's why I  
24 have Mr. Blackburn's testimony and Mr. Mailey's  
25 testimony, which Mr. Schwartz says, please, ignore,

1 because these are unambiguous. Well, we seem to be  
2 struggling with them.

3 So, as I put in my brief, I'm saying they're  
4 saying what I believe they say on their face, and that  
5 seems to be in dispute here.

6 THE COURT: Well, I'm prepared to make some  
7 decisions here.

8 First of all, I'm going to address the  
9 defendant's motion for summary disposition pursuant to  
10 MCR 2.116(C)(8), that motion tests the sufficiency of  
11 the pleadings, and in that context the Court looks  
12 exclusively at the plaintiff's complaint. And the  
13 complaint is very brief, to the point, and I find it  
14 alleges a cause of action for breach of contract, as  
15 well as a cause of action for promissory estoppel.  
16 And the Court relies on Schmidt versus Bretzlaff, 208  
17 Mich App 376, to establish the elements of promissory  
18 estoppel.

19 In referencing plaintiff's Exhibit A, which  
20 is the purchase order 9C941, which labels this a  
21 requirements contract; references a purchase order to  
22 supply 100 percent of the business, I find that, at  
23 worst, the plaintiff has established a genuine issue  
24 of fact, at best, plaintiff may be entitled to summary  
25 disposition on the issue of liability, and, frankly, I

1 have a little trouble with understanding the concept  
2 of a "requirements" contract which doesn't mean that  
3 you provide 100 percent of the product.

4 So, what I'm going to do at this point is  
5 I'm going to give Mr. Lippert and the defendants an  
6 opportunity to provide a supplemental memorandum or  
7 brief to the Court with the exhibits attached that  
8 create a genuine issue of fact here. In other words,  
9 to persuade the Court as to why summary disposition  
10 should not enter in favor of plaintiff pursuant to  
11 2.116(I)(2).

12 And, Mr. Lippert, how much time do you need  
13 to do that?

14 MR. LIPPERT: Could I have 10 days, Judge?

15 THE COURT: Certainly.

16 MR. LIPPERT: I'm going away for the weekend.

17 THE COURT: Well, why don't you make it easy  
18 on yourself? Let's -- how is two weeks?

19 MR. LIPPERT: Two weeks? That would be  
20 great.

21 MR. SCHWARTZ: Do we have a chance to reply  
22 at all or (inaudible)?

23 THE COURT: No, I'm --

24 MR. SCHWARTZ: You'll notify us if you want  
25 us to respond to it?



1 THE COURT: I will notify you if I want  
2 further argument.

3 At this point, your respective 10 minute  
4 arguments, which expanded into over an hour, and these  
5 materials, convinced me that I've got everything that  
6 there is on this subject. And I think -- well, I will  
7 ask Mr. Lippert to submit an order that denies the  
8 motion for summary disposition pursuant to (8), that  
9 denies the motion for summary disposition pursuant to  
10 (10), and I am going to defer ruling at this point on  
11 summary disposition for plaintiffs pursuant to  
12 116(I)(2).

13 Thank you, gentlemen. The Court is in  
14 recess.

15 MR. LIPPERT: Judge, on the other issues that  
16 were raised, are you deferring ruling on those also?

17 THE COURT: Pardon me?

18 MR. LIPPERT: I say on the other issues, the  
19 causes of actions, (inaudible)?

20 THE COURT: The standing, the transfer --

21 MR. LIPPERT: You are deferring on that,  
22 Judge?

23 THE COURT: No. I'm denying those motions --

24 MR. SCHWARTZ: Thank, Your Honor.

25 THE COURT: -- on the legal authority that

1 was cited by the plaintiff.

2 MR. LIPPERT: May I submit, Judge, a  
3 supplemental on that issue? A brief?

4 THE COURT: All I want is the liability  
5 issue.

6 MR. SCHWARTZ: Thank you, Your Honor.

7 (At 11:39 a.m., proceedings concluded)

8 Tape No. 03/24/05 11:39 a.m.

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STATE OF MICHIGAN )

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COUNTY OF GENESEE )

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May 25, 2005

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I, Shelie Robinson, do hereby certify that this transcript, consisting of 59 pages, is a complete, true and correct transcript to the best of my ability of the videotaped proceedings taken in this case on Thursday, March 24, 2005, before the Honorable Robert M. Ransom, Circuit Judge.



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